BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID W. BANKS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,046,725
SEARS HOLDING CORPORATION	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INSURANCE COMPANY	)	
OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the December 14, 2011, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on March 21, 2012. Due to a conflict, Board Member Gary R. Terrill recused himself from this appeal and Joseph Seiwert of Wichita, Kansas, was appointed as a Board Member Pro Tem by the Director.

APPEARANCES

Terry J. Torline of Wichita, Kansas, appeared for claimant. Brent M. Johnston of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Subsequent to oral argument before the Board, the parties entered into a stipulation, which was filed with the Division of Workers Compensation on March 28, 2012, that claimant's average weekly wage was $1,179.77 and that respondent is entitled to a credit for overpayment of temporary total disability benefits of $1,284.68.

ISSUES

In his December 14, 2011, Award ALJ Clark gave equal weight to the opinions of Drs. Pat Do and C. Reiff Brown and determined claimant was entitled to receive permanent partial disability benefits based upon a 30% whole body permanent functional impairment.[1] Claimant was also awarded nine weeks of temporary total disability benefits. At the regular hearing, the parties stipulated claimant's date of accident was August 2, 2008.

Respondent contends ALJ Clark erred in giving equal weight to the opinions of Drs. Brown (40%) and Do (21%) with regard to the nature and extent of claimant's disability. Respondent requests the Board adopt the opinions of Dr. Do regarding claimant's functional impairment and, accordingly, limit claimant to benefits based on a 21% whole body functional impairment. Claimant requests the Board adopt the opinions of Dr. Brown and find that claimant has sustained a 43% whole body functional impairment.

Claimant appealed the ALJ's findings on average weekly wage and respondent appealed that it should be given a credit for overpayment of temporary total disability payments. However, a March 28, 2012, stipulation by the parties resolved the issues of average weekly wage and overpayment of temporary total disability benefits. Therefore, the only issue before the Board on this appeal is:

What is the nature and extent of claimant's disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

At the time of the regular hearing, claimant had worked for respondent as an appliance technician for approximately ten years. Claimant's job duties require him to go to the homes of customers and work on appliances including washers, dryers, microwaves, ranges and air conditioners. He often gets into awkward positions and pulls, pushes and lifts appliances that can weigh hundreds of pounds. If he needs help moving the appliances, claimant asks for and receives assistance.

Claimant began having problems with his right wrist in August 2008, and Dr. Jonathan J. Loewen was authorized to provide treatment. Claimant first saw Dr. Loewen on September 22, 2008, for right wrist complaints. After two MRIs of

[1] On page 5 of his Award, ALJ Clark indicated claimant had a 30% work disability. This appears to be a typographical error as on page 4 of his Award, ALJ Clark determined claimant had a 30% impairment of function to the body as a whole.

claimant's right wrist, Dr. Loewen diagnosed claimant with a tear of the right scapholunate ligament and a right triangular fibrocartilage complex (TFCC) tear.

On December 15, 2008, claimant saw Dr. Loewen for ongoing left wrist pain and ordered an MRI, which revealed a TFCC tear. On August 3, 2009, Dr. Loewen was authorized to evaluate and treat claimant's left wrist. On August 25, 2009, Dr. Loewen performed arthroscopic surgery on the left wrist which included arthroscopic debridement of the TFCC tear, the scapholunate ligament tear and a lunotriquetral ligament tear, and an arthroscopic partial synovectomy of the left wrist. He released claimant to work on September 4, 2009, with temporary restrictions.

On December 23, 2008, Dr. Loewen performed arthroscopic surgery on claimant's right wrist which included arthroscopic debridement of a TFCC tear and a scapholunate ligament tear and an arthroscopic synovectomy of the right wrist. Dr. Loewen indicated claimant could return to work on January 21, 2009, with the restriction that claimant could not use his right hand. On February 11, 2009, Dr. Loewen changed claimant's restrictions to lifting no more than ten pounds with the right wrist and avoid things that cause pain.

On April 27, 2009, Dr. Loewen closed his case on claimant's right wrist. He opined that in accordance with the AMA *Guides*,[2] claimant had a 2% permanent impairment to the right upper extremity from wrist flexion loss and a 12% permanent impairment for right carpal instability, moderate instability pattern. Using the Combined Values Chart, claimant had a 14% right upper extremity impairment. Dr. Loewen gave claimant no permanent restrictions and recommended claimant use a wrist brace for support.

On October 5, 2009, Dr. Loewen examined claimant's left upper extremity. Claimant had a positive Tinel sign and was getting ulnar sided nerve symptoms. Dr. Loewen recommended an EMG study. On December 2, 2009, Dr. Loewen allowed claimant to return to work without restrictions. His assessment on that date was that claimant still had moderate ulnar nerve irritability. On January 4, 2010, Dr. Loewen closed claimant's case and indicated claimant had a 10% permanent impairment to the left upper extremity secondary to residual mild ulnar neuritis, a 10% impairment secondary to decreased strength for grip strength loss and a permanent impairment for mild carpal instability, which combined for an impairment to the left upper extremity of 24%.

In an Order dated February 18, 2010, Dr. Pat Do was authorized by the ALJ to treat claimant. Dr. Do first saw claimant on March 4, 2010, at which time claimant complained of neck pain, left shoulder pain and bilateral hand and wrist pain. Dr. Do recommended neck and left shoulder MRIs, which revealed tendinitis of the left rotator cuff, impingement

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

on claimant's neck, significant degenerative changes in the neck, central canal stenosis, and significant narrowing at the C6-C7 level. He recommended physical therapy and epidural steroid injections for claimant. Claimant underwent two of three scheduled injections and indicated they provided little relief. Consequently, Dr. Do referred claimant to a spine specialist.

On August 19, 2010, Dr. Samuel Bourn, an orthopedic surgeon, examined claimant. At that time, Drs. Bourn and Do practiced with Mid-America Orthopedics in Wichita, Kansas. Dr. Bourn made several assessments of claimant's left upper extremity, including left trapezial area pain, left shoulder impingement, left cubital tunnel syndrome and left carpal tunnel syndrome. He recommended claimant have left shoulder surgery and left cubital tunnel and carpal tunnel surgery.

On January 13, 2011, Dr. Raymond W. Grundmeyer, III, performed an anterior C6 vertebrectomy with a fusion and instrumentation at C5 through C7. He was not asked to give, nor did he give, claimant a permanent functional impairment.

At the request of his attorney, claimant was examined by Dr. C. Reiff Brown, an orthopedic specialist, on January 12, 2010, and June 14, 2011. Dr. Brown elected to use the Range of Motion Model to calculate claimant's permanent impairment to the neck. In his June 14, 2011, report, Dr. Brown stated:

> I have elected to use the Range of Motion Method of calculating this man's permanent impairment relative to his neck surgery and residual loss of range of motion. According to Table 75 on Page 113 he falls in the IIE "surgically treated disc lesion with residuals" 9% impairment of the body as a whole. He has an additional 1% whole body impairment based on IIF "multiple levels" one additional level. He has an additional 8% whole body impairment based on loss of range of motion of the cervical spine as noted in Tables 76, 77, and 78 on Pages 118, 119, 120, and 122. These values total 17% permanent partial impairment of function of the body as a whole, the result of his neck residuals. He has an additional 5% whole body impairment based on the DRE Cervicothoracic Category II, the result of his myofascial pain syndrome. . . .[3]

Dr. Brown testified the foregoing impairments combine for a 21% impairment to the body as a whole.

Dr. Brown also gave claimant permanent impairments to the left upper extremity of 7% for loss of range of motion due to rotator cuff tendinitis and 5% for loss of strength of the shoulder adductors. This combines for a 12% impairment at the left shoulder level and converts to a 7% whole body impairment. Furthermore, he gave claimant permanent impairments to the left upper extremity for the left hand of 5% on the basis of sensory

[3] Brown Depo., Ex. 3 at 2-3.

deficit of the ulnar distribution of the left hand, 5% on the basis of loss of strength and 6% on the basis of loss of range of motion. These combine for an 11% permanent impairment to the left upper extremity and convert to a 7% whole body impairment.

Additionally, Dr. Brown assigned claimant permanent impairments to the right upper extremity of 10% on the basis of grip strength weakness and 9% for loss of range of motion of the wrist joint. Combined, the foregoing equate to an 18% permanent impairment to the right upper extremity and convert to an 11% whole body impairment.

Originally Dr. Brown indicated that combining all of claimant's permanent impairments resulted in a 34% whole body impairment. Dr. Brown admitted this was a mistake and when all of the permanent impairments he assigned claimant were combined, claimant had a 40% permanent functional impairment to the body as a whole. He indicated that his impairment ratings were made in accordance with the *Guides*. Dr. Brown testified that if he strictly followed the *Guides*, claimant's various impairments combine to 42% to the body as a whole. He also assigned claimant permanent restrictions.

Dr. Brown was extensively cross-examined about the impairment ratings he gave claimant. He testified that he utilized the Range of Motion method because claimant had more impairment than the DRE method would allow. However, he acknowledged that using the DRE method is the preferred method under the *Guides*. Dr. Brown conceded that if the DRE method were used, claimant would have a 5% permanent impairment to the body as a whole for his neck injury.[4]

Dr. Brown testified that he repeats the range of motion testing three times and averages the results. Dr. Brown acknowledged that the *Guides* states the maximum angle of a set of valid measurements is to be used to determine impairment from the appropriate table. He indicated claimant's maximum angle was within 5 degrees of the average angle. Or he would not have used the average angle. However, Dr. Brown only kept the average angle measurements, not all of the range of motion test results. At one point in his testimony, Dr. Brown testified that he had not read the *Guides* in a long time.

Respondent had claimant re-examined by Dr. Do on June 29, 2011. His impressions were: (1) status post C6 vertebrectomy and fusion; (2) left shoulder impingement and probable rotator cuff tear; (3) left cubital tunnel syndrome; and (4) status post bilateral wrist arthroscopy for TFCC tears. With respect to claimant's neck injury, Dr. Do stated:

> In regards to his permanent impairment utilizing AMA Guides to Evaluation of Permanent Impairment, Fourth Edition, starting with his neck he gets a 10% whole person impairment, I ask you to turn to page 104. He can be as high as 15% whole

[4] Brown Depo. at 23.

> person impairment for DRE Cervical Thoracic Category III with radiculopathy, but that is for the most part improved and he also had some radiculopathy-type complaints from his ulnar nerve, so instead of double dipping I would assign a 10% whole person impairment for his neck.[5]

Dr. Do assigned the following permanent impairments for claimant's upper extremities: 6% for the left shoulder, 5% for left cubital tunnel syndrome, 4% for left wrist crepitus and 4% for right wrist crepitus. According to Dr. Do, combining the foregoing impairments to the upper extremities results in an 18% or 19% bilateral upper extremity impairment. To convert the 19% bilateral upper extremity impairment rating to a whole body impairment, Dr. Do then multiplied the 19% impairment of the bilateral upper extremities by 60% for an 11.4% whole body permanent impairment. He then combined that 11.4% permanent impairment with the 10% permanent impairment for claimant's neck for a 21% whole person impairment. He would not assign claimant a permanent impairment for loss of grip strength, as he opined that would be double dipping. He also testified that loss of grip strength is a subjective test and the *Guides* does not put a lot of weight in grip strength.

Dr. Do was asked why he did not give claimant a permanent impairment for left carpal tunnel syndrome, despite the fact that in August 2010, Dr. Bourn had recommended surgery on claimant's left wrist. His explanation was that when he examined claimant on June 29, 2011, claimant had no symptoms of carpal tunnel syndrome. Interestingly, despite testifying he had reviewed Dr. Bourn's records, Dr. Do indicated that, to his knowledge, claimant never had carpal tunnel syndrome.

It was acknowledged by Dr. Do that DRE Cervicothoracic Category II of the *Guides* provides for a 5% whole body impairment and DRE Category III provides for a 15% whole body impairment. Dr. Do admitted splitting these figures and assigning claimant only a 10% impairment. As a result of his C6 vertebrectomy, claimant had some numbness in his fourth and fifth fingers. If claimant was given a higher permanent impairment for his neck, based on radiculopathy, then giving claimant a permanent impairment for cubital tunnel syndrome would, in essence, be double dipping.

The ALJ chose to give approximately equal weight to the opinions of Drs. Do and Brown and found that claimant had a 30% impairment of function to the body as a whole. He awarded claimant nine weeks of temporary total disability benefits at the rate of $529.00 per week. As stated above, the issues of claimant's average weekly wage and overpayment of temporary total disability benefits were resolved by the March 28, 2012, written stipulation of the parties.

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[5] Do Depo., Ex. 2 at 2.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[6]

K.S.A. 44-510e(a) in part provides:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-525(c) states:

> (c) In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

ANALYSIS

Claimant was given permanent functional impairment ratings by three physicians – Drs. Loewen, Brown and Do. Admittedly there are questions about the permanent

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[6] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

impairments Drs. Brown and Do assigned claimant. However, the Board finds that the impairment ratings of Drs. Brown and Do are in accordance with the *Guides*. Dr. Loewen was the treating physician for claimant's bilateral upper extremity medical problems. However, Dr. Loewen's rating of claimant's right upper extremity was given on April 27, 2009, and on January 4, 2010, for claimant's left upper extremity. Claimant received medical treatment to his left upper extremity and surgery to his neck after being rated by Dr. Loewen. Dr. Loewen opined claimant had a permanent impairment for left mild carpal instability, but did not give an opinion as to the percentage of that impairment.

The Board gives equal weight to the opinions of Drs. Brown and Do as to claimant's bilateral upper extremity and neck functional impairments. Dr. Brown assigned claimant an 11% whole body impairment for the right upper extremity, a 7% whole body impairment for the left upper extremity at the shoulder level, a 7% whole body impairment for the left hand, and a 21% impairment to the neck. He originally calculated that those impairments combine to a 34% whole body impairment, but corrected his opinion and gave claimant a 40% permanent functional impairment to the body as a whole.

Dr. Do assigned claimant permanent functional impairments to the upper extremities, which combined and converted, result in an 11.4% whole body impairment, and a 10% permanent impairment for claimant's neck. Dr. Do combined the impairments for a 21% permanent impairment to the body as a whole.

Averaging the whole body impairments of 40% from Dr. Brown and 21% from Dr. Do results in a 30.5% permanent impairment of function to the body as a whole. However, the parties did not dispute the ALJ's finding that averaging the ratings of Drs. Do and Brown equaled 30%.

CONCLUSION

Claimant sustained his burden of proof that he suffered a 30% permanent impairment of function to the body as a whole, which resulted from his accident on August 2, 2008.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[7] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

[7] K.S.A. 2011 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the December 14, 2011, Award entered by ALJ Clark by finding:

David W. Banks is granted compensation from Sears Holding Corporation and its insurance carrier for an August 2, 2008, accident and resulting disability. Based upon an average weekly wage of $1,179.77, Mr. Banks is entitled to receive 6.57 weeks[8] of temporary total disability benefits at $529.00 per week, or $3,476.32, plus 124.50 weeks of permanent partial disability benefits at $529.00 per week, or $65,860.50, for a 30% permanent partial disability, making a total award of $69,336.82, which is all due and owing less any other amounts previously paid.[9]

The remainder of the ALJ's Award that is not inconsistent with the foregoing is affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER PRO TEM

[8] This amount was derived by subtracting $1,284.68 (the credit for the overpayment of temporary total disability benefits) from $4,761.00 ($529.00 x 9 weeks paid), which equals $3,476.32. That amount divided by $529.00 equals 6.57 weeks.

[9] As indicated above, the credit for the overpayment of temporary total disability benefits has been applied to the computation of benefits.

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